No. 21,746

# In the United States Court of Appeals for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

EVEREST & JENNINGS, INC., RESPONDENT

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**On Petition for Enforcement of an Order of the National Labor Relations Board**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 45-46,

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[1] Pertinent provisions of the Act are set forth in Appendix A, *infra*, pp. 26-27.

60-61),[2] issued against respondent on May 26, 1966. The Board's decision and order are reported at 158 NLRB No. 113. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Los Angeles, California, where respondent is engaged in the manufacture of wheelchairs. No jurisdictional issue is presented.

## STATEMENT OF THE CASE

### I. The Board's Findings of Fact

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by threatening its employees with economic reprisals should the Union[3] win the election, by encouraging the filing of accusatory affidavits against union supporters, by issuing warning notices pursuant to these affidavits, and by granting employee Werner Woelke more advantageous seniority rights to encourage him to oppose the Union. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by the layoff of employee Fred Davis and the discharge of employee Truesdell Brown because of their support of

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[2] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "R. Exh." and "G.C.Exh." are to exhibits of respondent and the General Counsel.

[3] International Association of Machinists and Aerospace Workers, AFL-CIO.

the Union. The evidence upon which the Board based its findings is summarized below.

### A. *Background*

In early 1965,[4] the Union began its organizing campaign at the Company's plant (R. 32; Tr. 17-18). In response to this drive, respondent distributed a letter, dated February 12, which described the "profound effects" unionization would have on the Company and on its employees (R. 32; R. Exh. 9). In this letter, respondent's president, Gerald Jennings, stated, *inter alia*, that the Union was "up to its usual tricks of making 'pie-in-the-sky' promises," that any threats made by union supporters should be reported to management so that "prompt action" could be taken against the guilty employees, and that the employees were free to join or oppose the Union and "to speak out in favor of the direct above-board relationship we have enjoyed in the past." (*Ibid.*).

On this same date, February 12, President Jennings distributed another communication to the employees informing them that the Company "has been advised" that certain employees were conducting union activities during working hours and leaving their work area for "purposes unrelated to their work" (R. 33; R. Exh. 23). Jennings' letter stated that he, personally, would guarantee that no employee will lose his job or be otherwise penalized if he decided not to join the Union or to have the Union represent him and that "any employee found guilty of spread-

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[4] All dates are 1965 unless otherwise stated.

ing false rumors to the contrary will be subject to severe discipline" (*ibid.*). The letter concluded by referring the employees to the rules set forth in the Company Handbook concerning "Starting . . . false or malicious gossip or rumors regarding [the Company] . . . Unauthorized absence from assigned place of work . . . Visiting during working hours, or going into other Departments except in the line of duty. . ." (*ibid.*).

### B. *The Company's coercive antiunion campaign; the discriminatory layoff of employee Fred Davis*

On February 12, shortly before distribution of the Company's letters to its employees, employee Mary Cornelius went to the office of Vice-President Fred Callahan (R. 34; Tr. 294). There, in the presence of Callahan, President Jennings, and labor consultant Lyman Powell, the employee stated that the Union "was going strong" in the plant and that employee Fred Davis had been "pushing union" during working hours[5] (R. 34; Tr. 322-324, 380-381). When Cornelius asked what she should do about this situation, Powell informed her that she could submit a sworn statement as to what had occurred and then the Company could discipline the persons involved (R. 34; Tr. 323-324). Cornelius then left Callahan's office and returned to her work area. There she told

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[5] According to Cornelius' testimony, on February 11 or 12, while she and Davis were returning to their work stations from a warehouse where their duties had taken them, Davis asked her if she wanted to sign a union card. Cornelius replied that she did not want to do so and the conversation ended (R. 34; Tr. 386).

two other employees, Geraldine Weems and Myrtle Miller, that if Fred Davis had bothered them they had a right to sign a sworn statement to that effect and submit it to the Company (R. 34; Tr. 382). That same day, Cornelius, Weems and Myrtle filed affidavits, notarized by the company's notary public, stating that Davis had solicited their union membership during working hours (R. 34-35; G.C. Exh. 16, 17, 18).

Upon the filing of these affidavits, Callahan consulted with Superintendent Ray Jenkins. The two officials, reasoning that Davis had been reprimanded during the Union's campaign a year earlier for soliciting on company time, decided to suspend Davis without pay for a period of three days (R. 35; Tr. 303, 326). That afternoon, on February 12, Davis was summoned to Jenkins' office where he was charged with "harassing employees during their working hours" and told of his three-day layoff (R. 35; Tr. 94-95). When Davis denied the charge against him, Jenkins stated that he had three affidavits from employees which supported the contention. Jenkins, however, refused Davis' request that these affidavits be produced (R. 35; Tr. 95-96).

That same afternoon, February 12, several other employees executed affidavits which also alleged that certain fellow employees had engaged in union solicitation during working hours (R. 36; Tr. 324-325). Upon receipt of these affidavits, the Company immediately issued "warning notices" to all of the accused employees. These notices admonished the employee for his "harassment" of other employees and

stated that "further such action by you will subject you to disciplinary action and possible discharge" (R. 36; G.C. Exh. 8). In a few instances the warning notices were withdrawn after an accused employee protested his innocence and an investigation, conducted by Vice President Callahan, showed that he had not in fact solicited for the Union during company time (R. 36; Tr. 302). In cases involving only the word of the accused employee against his accuser, the warning notices were not rescinded. At no time was an accused employee told the name of the employee who had submitted the affidavit against him (*ibid.*).

As noted above, employee Davis was given a three-day layoff as a result of the affidavits filed against him. When he returned to work on February 18, Davis was approached by Superintendent Ray Jenkins. Jenkins told the employee that a union was not needed in the plant and he offered to bet Davis $5.00 that the Union would lose the election. Davis accepted this bet (R. 35; Tr. 96, 450). One week later, on February 24, Foreman James Bredehoft talked to Davis for about an hour and a half concerning the need for a union at the plant. Bredehoft told the employee that other plants had closed down because they became unionized and that the same thing could happen at the Company's plant if the Union won the election (R. 35; Tr. 96-97). Davis then asserted that the Company was showing favoritism when it disciplined him for allegedly soliciting for the Union on company time, but at the same time allowing other employees to campaign against it on company time.

Bredehoft replied that these other employees were "for the company" (R. 35; Tr. 97).

On February 25, Bredehoft engaged employee Werner Woelke in a conversation concerning the Union (R. 38; Tr. 161). Woelke had joined the Union during its organizing campaign and wore a union button to work (*ibid.*). On this occasion, Bredehoft told Woelke that a union was not needed in the plant and that there would be "no good relations" if the Union succeeded (*ibid.*). Woelke then told Bredehoft that he thought that he had been mistreated by the Company in the determination of his seniority rights[6] (R. 38; Tr. 162). Bredehoft asked the employee if he would like to see President Jennings about this situation and Woelke replied that he would (R. 38; Tr. 162). A meeting was then arranged for later that day (*ibid.*). As Woelke and Bredehoft were on their way to this meeting, Bredehoft suggested that Woelke remove the union button which he was wearing; the employee did so (R. 38; Tr. 162-163). At the meeting, attended by management officials Jennings, Callahan, Bruce Blickensderfer, and attorney Powell, Woelke stated his complaint concerning his loss of seniority. Upon the advice of Powell, the Com-

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[6] Woelke had been discharged in February 1964, for engaging in a fight with another employee. A few days after his discharge, however, he was rehired. In June 1964, Woelke learned that his vacation rights were being calculated without credit for the time he had worked before his discharge. Although Woelke protested to the Company about this situation, he was unable to get his seniority restored (R. 38; Tr. 162, 491-493, G.C.Exh. 14).

pany thereupon informed Woelke that his seniority rights were being restored (R. 38; Tr. 163, 495).

On February 26, employee Frank Medina was approached by his supervisor, Edward Gibola, while in the carpenter shop (R. 38; Tr. 141). Gibola told the employee that he did not want a union in the plant and that if the plant did become unionized Medina would lose about 85 cents in fringe benefits. Gibola then stated that the Company could discontinue the employees' Christmas bonus and do away with its annual spring dinner and Christmas breakfast (R. 38; Tr. 142-143). When Gibola added that Medina was free to make his own choice in this respect, Medina told him that he was going to vote against the Union (R. 38; Tr. 142).

### C. *The discriminatory discharge of employee Truesdell Brown*

Truesdell Brown had been employed by the Company since May 1963, as a punch press operator in the machine shop (R. 36; Tr. 178). On February 15, 1965, Superintendent Robert Godfrey came to Brown's supervisor, William Hester, with a "warning notice" to be issued to Brown[7] (R. 36; Tr. 518). When Hester served the notice on Brown, the employee denied that he was guilty of the charge. Brown, however, did agree to sign the warning slip, stating that he did not want to lose his job and have

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[7] These were the notices that the Company issued pursuant to the filing of affidavits of employees alleging that fellow employees were soliciting for the Union on company time. See, *supra*, pp. 5-6.

his wife and children deprived of his support (R. 37; Tr. 178-179). Brown then told Hester that he thought that Lee Melstrom, one of the two employees who signed accusatory affidavits against Brown,[8] could support his claim of innocence in this matter. When the two men approached Melstrom and asked him about the allegation, however, Melstrom stated that Brown had in fact solicited his support of the Union while they were on the job (R. 37; Tr. 179). At that point Brown, characterized by Hester as a "quiet" individual, angrily called Melstrom a "lying son-of-a-bitch" and the two men began to approach each other (R. 37; Tr. 180, 518-519). Hester stepped between the two employees and calmed the situation. Melstrom then stated that he had been misunderstood on this matter and that Brown had engaged him in union solicitation only during non-working hours (R. 37; Tr. 180, 520). Brown apologized to Melstrom for his actions and the men returned to work (R. 37; Tr. 180).

Hester reported this incident to Superintendent Godfrey and Vice-President Callahan. It was decided that another warning notice would be issued to Brown for his conduct earlier that day (R. 37; Tr. 521). This notice, issued because of Brown's "abusive language and threatening another employee", was given to Brown on February 16 by Hester and Godfrey (R. 37; Tr. 180, 521). Brown read the no-

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[8] In addition to Melstrom, employee Ervin Sinor also submitted an affidavit of this nature. Sinor's action was taken pursuant to the suggestion of his supervisor, Earl Ruffner, that he file such an affidavit (R. 37; Tr. 505).

tice and, visibly nervous and shaking, tore it up. He then accused Godfrey and Hester of "picking on him" and asserted that the Company was trying to get rid of him (R. 37; Tr. 181, 522-523, 531, 547). Godfrey replied that the Company was not "after" Brown and his union activities had nothing to do with the issuance of this reprimand (R. 37; Tr. 547-548). Brown then asked Godfrey if it would clear matters if he apologized to Melstrom for his actions and, accompanied by Hester, Brown went to Melstrom's work area. The two employees shook hands and Godfrey called everyone back to work (R. 37; Tr. 182).

Immediately after this incident, Godfrey went to Callahan and Jennings and told them what had happened (R. 37; Tr. 364). After some discussion, Jennings stated that Brown should be discharged (R. 37-38; Tr. 308, 364). Brown was then summoned to the office where Callahan informed him that he was being terminated because he had been "insubordinate" and had destroyed company property by tearing up his warning notice (R. 38; Tr. 183). Brown said that he had heard enough and left the office (R. 38; Tr. 184).

### II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by threatening its employees with economic reprisals if the plant were to be unionized, by granting employee Woelke greater seniority rights to encourage him to oppose the Union, by encouraging the filing of accusatory affidavits against supporters of the Union,

and by issuing warning notices pursuant to these affidavits in order to systematically harass the union supporters. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act when it laid off employee Fred Davis and discharged employee Truesdell Brown because of their activities on behalf of the Union.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to offer employee Brown full reinstatement, to make Brown and employee Davis whole for any loss of earnings suffered because of the Company's discrimination against them, and to post the appropriate notices (R. 45-46, 60-61).[9]

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[9] In view of the Company's unfair labor practices during the critical preelection period, the Board adopted the Trial Examiner's recommendation that the election of March 4, 1965, be set aside. The Board accordingly directed a new election be held at such time as the Regional Director deems appropriate (R. 60-61). This action of the Board is not before the Court as it does not constitute a final order of the Board reviewable under Section 10 of the Act. *A.F.L.* v. *N.L.R.B.*, 308 U.S. 401, 409; *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F. 2d 100, 106, n. 10 (C.A. 5); *Daniel Construction Co.* v. *N.L.R.B.*, 341 F. 2d 805 (C.A. 4), cert. denied, 382 U.S. 831.

## ARGUMENT

### I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Interfered With, Restrained and Coerced Its Employees in Violation of Section 8(a)(1) of the Act

As shown in the Statement, the Company responded to the Union's organizing efforts at its plant by initiating a campaign of its own designed to stem this growing tide of unionism. In a letter, dated and distributed to the employees on February 12, the Company detailed the "profound effects" unionization would have on both the company and the employees (R. Exh. 9). In another communication, distributed that same day, the Company warned the workers against conducting union activities during working hours and leaving their work areas for "purposes unrelated to their work" (R. Exh. 23). Then by means of threats, coercive statements, granting of economic benefits, encouraging employees to file affidavits against prounion employees, and issuing warning notices pursuant to these affidavits, the Company proceeded to inhibit its employees in the full exercise of their statutory rights.

Thus, on February 24, Foreman James Bredehoft spoke with employee Fred Davis for more than an hour in an attempt to get Davis to disaffiliate from the Union. Davis, who one week earlier had been suspended from work because of his alleged union solicitation during working hours (see, *infra*, pp. 18-21), was told by Bredehoft that the plant might be forced to "close down" if the Union was successful in its organizational effort (Tr. 97). Two days later,

employee Frank Medina was approached by his supervisor, Edward Gibola. Gibola informed Medina that the Company did not want the Union and that if the plant became unionized Medina would lose about 85 cents worth of fringe benefits. Gibola then warned the employee that if the Union did succeed, the Company could discontinue its Christmas bonus, its spring dinner and its Christmas breakfast for the employees (Tr. 141-143). Such statements by supervisory personnel, coming at the height of the Union's organizing drive, represent the clearest sort of coercive conduct violative the Act.[10] See, *N.L.R.B.* v. *V. C. Britton Co.*, 352 F. 2d 797, 798 (C.A. 9); *N.L.R.B.* v. *Action Wholesale Co.*, 342 F. 2d 798 (C.A. 9), enf'g, 145 NLRB 627, 633-634; *N.L.R.B.* v. *Kit Mfg. Co.*, 292 F. 2d 686, 688 (C.A. 9); *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261-262 (C.A. 9); *N.L.R.B.* v. *Sebastopol Apple Growers Union*, 269 F. 2d 705, 707-708 (C.A. 9).

At this same time, on February 25, Foreman Bredehoft spoke to employee Werner Woelke, an

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[10] Although Bredehoft and Gibola both testified that they did not make the threats attributed to them, the Trial Examiner discredited their denials. The Board adopted these findings (R. 40-41, 59-60). It is well settled that the resolution of conflicting testimony is the responsibility of the Trial Examiner and the Board and that their determinations ordinarily will not be disturbed by a reviewing court. *N.L.R.B.* v. *Local 776, I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Anderson*, 206 F. 2d 409 (C.A. 9), cert. denied, 346 U.S. 938. We submit that the Trial Examiner's credibility resolutions, adopted by the Board, are entitled to affirmance here.

avowed union supporter, in an attempt to cause his defection from the Union. Bredehoft told the employee that a union was not needed in the plant and if the plant should be organized, it would bring about "no good relations" amongst the employees (Tr. 161). Woelke, however, expressed the view that he had been mistreated by the Company and that he was still dissatisfied about respondent's disposition of his dispute concerning certain of his seniority rights. In Woelke's case, the employee had been denied credit by respondent for his employment time preceding the date of his discharge in February 1964, even though he had been reemployed just a few days later. Although his earlier protest had been fruitless, on this occasion Bredehoft asked Woelke if he would like to see President Jennings about the matter and, that same day, arranged for a meeting between the two men. On their way to this meeting, however, Bredehoft suggested to Woelke that he remove the union button which he was wearing and the employee did so. At the meeting, Woelke stated his complaint to the management officials and was then told that his seniority was being restored.

It is clear that the restoration of Woelke's seniority rights was motivated by the Company's desire to cause his disaffiliation from the Union. Prior to the Union's organizing campaign at the plant, Woelke had tried unsuccessfully to reacquire these rights (Tr. 491). It was only after he based his preference for the Union on the fact that he had been "mistreated" as to his seniority, that he was granted this benefit. Even then, he was advised by Bredehoft to

remove his union button before seeing the management officials because "it looked better" (Tr. 163). The granting of this economic benefit to Woelke, in an obvious attempt to persuade him to reject the Union, falls plainly within the ambit of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Kit Mfg. Co.*, *supra*, 292 F. 2d at 288; *N.L.R.B.* v. *Laars Engineers, Inc.*, 332 F. 2d 664, 666-667 (C.A. 9); and see, *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678, 684; *N.L.R.B.* v. *Parma Water Lifter Co.*, *supra*, 211 F. 2d at 261-262.

To complement these blatant acts of interference, restraint and coercion, the Company proceeded to harass its prounion employees by issuing warning notices to them based on their alleged violation of a rule prohibiting solicitation for the Union during working hours, immediately after announcing a new and more restrictive rule. While the enactment and enforcement of work rules is normally wholly within management's control, if such rules are put into effect to undermine the union activities of its employees—and disciplinary action is taken pursuant to the rule—it is proscribed conduct under Section 8(a)(1) of the Act. See, *Revere Camera Co.* v. *N.L.R.B.*, 304 F. 2d 162, 164 (C.A. 7); *Sabine Vending Co.*, 147 NLRB 1010, enf'd, 355 F. 2d 932 (C.A. 5). As the Fourth Circuit has stated (*N.L.R.B.* v. *Lester Bros., Inc.*, 301 F. 2d 62, 67):

> . . . the sudden enforcement of the rules, reasonable in themselves, at the height of union organizational efforts, constituted an unfair labor practice, particularly when combined with the

> threat of *dismissal* for infringement of rules, the violation of which normally . . . would not violate plant security, or otherwise seriously affect the plant's operations.

These notices, warning of "disciplinary action and possible discharge" if the activity continued, were issued after the Company had openly encouraged the filing of accusatory affidavits by antiunion employees. Yet, it is settled law that an employer's instigation, participation and encouragement of union repudiating activities on the part of its employees is violative of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Howard Cooper Corp.*, 259 F. 2d 558, 559-560 (C.A. 9), and cases cited therein; *N.L.R.B.* v. *Birmingham Publishing Co.*, 262 F. 2d 2, 7 (C.A. 5); *Edward Fields, Inc.* v. *N.L.R.B.*, 325 F. 2d 754, 759-760 (C.A. 2); *N.L.R.B.* v. *Mid-West Towel & Linen Service*, 339 F. 2d 958, 960-961 (C.A. 7); *N.L.R.B.* v. *Scherer & Sons, Inc.*, 370 F. 2d 12, 13 (C.A. 5), enf'g *per curiam*, 147 NLRB 1442, as modified. "The dominant purpose [of the Act] is the right of employees to organize for mutual aid without employer interference." *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 798; *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409.

The Board's finding that the Company unlawfully promoted and encouraged the filing of affidavits against employees who had allegedly solicited for the Union on company time is amply supported by the record. Thus, on February 12, Supervisor Earl Ruffner approached employee Ervin Sinor at his work

area and "asked" the employee to sign an affidavit embodying his previously expressed complaint that other employees had solicited his union membership (Tr. 505-506). Sinor was told to go to the office of the Company's notary public, Elizabeth Janes. There, with Janes supplying him with the full names of the accused employees, Sinor signed an affidavit. On this same day, employee Mary Cornelius was told by Lyman Powell, the Company's attorney, that she could file an accusatory affidavit and "the company would notarize it for her" (Tr. 324). She also took advantage of this service and submitted her notarized affidavit to the management. As Vice-President Callahan conceded, before this time "it was not the general rule at the plant for . . . one employee to file an affidavit against another employee" (Tr. 323). With Cornelius spreading the word throughout the plant, some 20 of these notarized affidavits were filed by employees accusing others of soliciting for the Union.

Clearly, the whole procedure had the earmarks of a management sponsored program which the employees would hesitate to oppose for fear of incurring management's displeasure. For once it received the affidavits, the Company proceeded to issue warning notices, containing threats of discharge, to the accused employees. The truth of these affidavits was not questioned by any management official. Only if the accused employee protested his innocence was an investigation conducted and then only if the employee was clearly free of guilt was his warning notice withdrawn. In cases involving only the word of the accused employee against that of his accuser, the warn-

ings remained in effect, although the Company had recognized in the other cases that its encouragement had produced false accusations. In no case was the employee notified of the name of the person accusing him of the prohibited solicitation. With the threat of discharge or other disciplinary action now hanging over the head of each union supporter, these affidavits and notices became the most effective weapons in the Company's arsenal of coercive antiunion tactics. For, as shown below, these devices were immediately seized upon by the Company to effectuate the layoff of employee Davis and the discharge of employee Brown, both known union activists.

## II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act When It Laid Off Employee Fred Davis and Discharged Employee Truesdell Brown Because of Their Activities on Behalf of the Union

### A. *The layoff of employee Davis*

The Board's finding that the Company laid off employee Davis because of his union activities has substantial support in the record. Davis was one of the leading union activists in the plant, during both this union campaign and a similar organizational drive one year earlier. Concededly, respondent was well aware of Davis' activities on behalf of the Union during these periods. When, on February 12, it received affidavits from three antiunion employees stating that Davis had solicited their union membership during working hours, the Company, without any concern as

to the validity of these charges, decided to suspend Davis for a three-day period. The layoff took effect immediately thereafter.

The Company's anxiety to punish this union adherent during the height of the Union's organizing effort is apparent from the manner in which Davis' layoff was effectuated. When confronted by Superintendent Jenkins with the accusation that he had been "harassing employees during their working hours", Davis denied that he had been guilty of such a charge (Tr. 95). Jenkins then referred to the three accusatory affidavits—signed by employees Cornelius, Weems, and Miller—but refused Davis' request that they be produced (Tr. 96). Davis asked that he be told the names of his accusers, but again Jenkins refused to give him this information (Tr. 449). Moreover, the record shows that no investigation was conducted by any management official as to the truth of the affidavits and at no time were any of the three employees questioned concerning the full facts of the alleged solicitation. While their affidavits stated that Davis had solicited their membership "numerous times" during working hours, their testimony reveals only single instances of such solicitation, all taking place before the Company's newly imposed strict prohibition against such solicitation.[11] Thus, Cornelius

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[11] As shown above, prior to the Company's letter to its employees on February 12, there existed no specific rule against union solicitation during working hours. While there is testimony showing that employees knew of a prior restriction on union solicitation during working hours, it is evident that such a restriction was imposed only during a union

testified that the "only time" during this campaign that Davis approached her was on the morning of February 11 or 12 (Tr. 386-387); Weems testified that "the only time" Davis talked to her about the Union at this time was on February 10, when during an argument that she was having with a supervisor, Davis told her that if she signed a union card she would not "have to take that guff" (Tr. 412-413, 409).[12] Miller was not called as a witness. In short, a simple investigation of the matter by the Company would have disclosed that Davis' alleged solicitations had occurred either during the union campaign a year earlier or before the Company announced that such solicitation during the present campaign would not be tolerated. Obviously, the Company was not in-

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organizing campaign (Tr. 102). Thus, as of February 12, only if the solicitation involved leaving one's working area or being inattentive to his job would it be considered to have been in violation of a published plant rule. Here, even assuming that Davis did solicit during working hours, the testimony of employees Cornelius and Weems shows that it did not require Davis to be away from his work station or to ignore his own work. Coming as it did before the February 12 declaration of company policy, it cannot be maintained that Davis' alleged solicitations were in violation of the existing rules governing such conduct (see, *supra*, pp. 15-16).

[12] Davis' statement to Weems, coming as a spontaneous remark with only generalized references to the employee's statutory rights, wholly lacked the intent which is normally found in solicitations. Thus, it is questionable whether the statement actually constituted union solicitation or was only "a simple exchange of information among employees" which have been held to be beyond the reach of company no-solicitation rules. *N.L.R.B.* v. *Great Atlantic & Pacific Tea Co.*, 277 F. 2d 759, 762 (C.A. 5).

terested in even so simple an explanation but was concerned only with punishing one of the Union's leading supporters. As such, the "arbitrary action [by the Company] seem[s] more consistent with antipathy for union activity than concern over plant rules." *Time-O-Matic Corp.* v. *N.L.R.B.*, 264 F. 2d 96, 102 (C.A. 7).

In view of the Company's coercive attempts to defeat its employees' organizational efforts, its knowledge of Davis' active participation in those efforts, and the circumstances of the layoff, we submit that the Board properly rejected respondent's explanation for the suspension and found instead that the layoff was discriminatorily motivated. *N.L.R.B.* v. *Sebastopol Apple Growers Union*, *supra*, 269 F. 2d at 709-710; *N.L.R.B.* v. *Homedale Tractor & Equipment Co.*, 211 F. 2d 309, 313-314 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Dant & Russell*, 207 F. 2d 165, 166-167 (C.A. 9); *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 907 (C.A. 9).

### B. *The discharge of employee Brown*

Under strikingly similar circumstances, employee Truesdell Brown was discharged on February 16, the day after Davis had been discriminatorily laid off. Brown, described by Supervisor William Hester as a "very good employee" (Tr. 518), also had actively participated in the Union's organizing campaign. His activities in this respect were fully known by the Company and, as Hester testified, two weeks before his discharge several supervisors had reported that

Brown had been passing out union leaflets (*ibid.*). Again by the use of accusatory affidavits and warning notices, a pretext was soon found by respondent to effectuate the discharge of this union adherent.

Thus, on February 15, Superintendent Robert Godfrey instructed Hester to issue a warning notice to Brown based on the affidavits filed by employees Lee Melstrom and Ervin Sinor.[13] When Brown was given the notice he denied the charge against him and maintained that employee Melstrom would support his claim of innocence. However, when Melstrom was asked about his affidavit he stated that Brown did solicit his membership. Thereupon, Brown, whom Hester considered to be a "quiet individual", called Melstrom a "lying son-of-a-bitch" and the two employees began to approach each other (Tr. 180, 518-519). Hester stepped between them and calmed the situation, whereupon Melstrom admitted that he had been misunderstood and that Brown's solicitation had occurred outside of working hours; Brown immediately apologized to Melstrom for his actions. Despite this apology and the immediate resumption of work by the employees, the Company seized upon this incident to issue another warning notice to Brown based upon his conduct of that day. When Hester and Godfrey gave him this second notice the next day, Brown, visibly shaken by the Company's increasing attack against him, tore the notice into several pieces and accused the supervisors of trying to get rid of him.

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[13] As shown above, Sinor was "asked" to file the affidavit by his supervisor, Earl Ruffner (Tr. 505-506).

Then, evidently realizing the precariousness of his position as a strong union adherent in the plant, he asked if it would clear matters if he again apologized to Melstrom. When Brown and Melstrom shook hands, the men were called back to work and the incident was over. Yet, the Company now had what it was after—based on his "insubordination" and his "destroying of company property" by tearing up the warning notice (Tr. 183), Brown was summarily discharged.

In short, the record amply supports the Board's finding that Brown's discharge was motivated not by legitimate business reasons but because of his activities on behalf of the Union. Although Brown was considered a "very good employee", his overt union activity during the height of the organizing campaign made him an obvious target for the Company's anti-union responses. When issued his first warning notice, he protested his innocence and ultimately was supported in his claim by employee Melstrom. Yet the Company, now fully cognizant of Brown's sensitivity to its concern over his union activities, issued another warning to the employee. His subsequent conduct—"insubordination" by accusing the Company officials of trying to get rid of him and "destruction of company property" by tearing up the notice—was hardly of such a nature, but for his union adherence at the time of intense union activity, to warrant the discharge of a "very good employee". Surely, the reaction of this usually "quiet employee" to the issuance of the second notice, while not to be condoned, was a predictable result of the harassment

which Brown, as a leading unionist, was forced to endure.[14] It is settled law that intemperate and on-the-spot employee reaction to unlawful discrimination does not of itself negate a finding that the ensuing discharge was itself unlawful. As stated by the Fourth Circuit:

> An employer cannot provoke an employee to the point where he commits such an indiscretion as is shown here and then rely on this to terminate his employment . . . The more extreme an employee's justified sense of indignation . . . the more likely its excessive expression . . .

*N.L.R.B.* v. *M & B Headwear Co.*, 349 F. 2d 170, 174 (C.A. 4); Accord: *N.L.R.B.* v. *Mrak Coal Co.*, 322 F. 2d 311 (C.A. 9); *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F. 2d 899, 904 (C.A. 2); *N.L.R.B.* v. *Morrison Cafeteria Co.*, 311 F. 2d 534, 538 (C.A. 8).

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[14] It cannot be disputed that "the existence of some justifiable ground for discharge is no defense if it was not the motivating cause." *N.L.R.B.* v. *Texas Independent Oil Co., Inc.*, 232 F. 2d 447, 450 (C.A. 9); *N.L.R.B.* v. *Tonkin Corp.*, 352 F. 2d 509 (C.A. 9).

## CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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DOMINICK L. MANOLI,
*Associate General Counsel,*

MARCEL MALLET-PREVOST,
*Assistant General Counsel,*

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RICHARD S. RODIN,
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*National Labor Relations Board.*

June 1967.

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

### Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

### Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or

restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

## APPENDIX B

### INDEX TO REPORTER'S TRANSCRIPT

(Numbers are to pages of the reporter's transcript)
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## RESPONDENT'S EXHIBITS

| No. | Identified | Offered | Received in Evidence | Rejected |
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## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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*National Labor Relations Board*

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